

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MIKE ESKRA,)	
)	
Plaintiff,)	
)	
v.)	No. 4:06 CV 851 ERW
)	DDN
MICHAEL J. ASTRUE, ¹)	
Commissioner of Social Security,)	
)	
Defendant.)	
)	

**REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE**

This action is before the court for judicial review of the final decision of defendant Commissioner of Social Security denying the applications of plaintiff Mike Eskra for disability insurance benefits and supplemental security income under Title II and Title XVI of the Social Security Act (the Act), 42 U.S.C. §§ 401, et seq., and 1381 et seq. The action was referred to the undersigned United States Magistrate Judge for a recommended disposition under 28 U.S.C. § 636(b).

1. Background

Plaintiff Mike Eskra applied for disability benefits on June 8 and July 9, 2004. He alleged he became disabled on May 26, 2004, at the age of 40, due to pain in his back, arms, and hands.² (Tr. 11, 110-12, 118, 145.)

Following an evidentiary hearing held on March 22, 2005, an administrative law judge (ALJ) issued a written opinion denying benefits

¹Michael J. Astrue became the Commissioner of Social Security on February 12, 2007. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Michael J. Astrue is substituted as defendant in this suit. 42 U.S.C. § 405(g).

²Plaintiff was previously awarded disability benefits with an onset date of January 1994, based on a September 15, 1993 application. He received disability benefits until April 2002. (Tr. 11.) As of January 2005 plaintiff was paying off disability benefits overpayment of \$12,000. (Tr. 56.)

on June 14, 2005. (Tr. 11-17.) Because the Appeals Council denied review of the ALJ's decision, it became the final decision of the Commissioner for review in this action. (Tr. 4.)

2. General Legal Principles

The court's role on judicial review of the Commissioner's decision is to determine whether the Commissioner's findings are supported by substantial evidence in the record as a whole. Pelkey v. Barnhart, 433 F.3d 575, 577 (8th Cir. 2006). "Substantial evidence is relevant evidence that a reasonable mind would accept as adequate to support the Commissioner's conclusion." Id. In determining whether the evidence is substantial, the court considers evidence that detracts from, as well as supports, the Commissioner's decision. See Prosch v. Apfel, 201 F.3d 1010, 1012 (8th Cir. 2000). As long as substantial evidence supports the decision, the court may not reverse it merely because substantial evidence exists in the record that would support a contrary outcome or because the court would have decided the case differently. See Krogmeier v. Barnhart, 294 F.3d 1019, 1022 (8th Cir. 2002).

To be entitled to disability benefits, a claimant must prove he is unable to perform any substantial gainful activity due to a medically determinable physical or mental impairment that would either result in death or which has lasted or could be expected to last for at least 12 months. See 42 U.S.C. §§ 423(a)(1)(D), (d)(1)(A), 1382c(a)(3)(A). A five-step regulatory framework governs the evaluation of disability in general. See 20 C.F.R. §§ 404.1520, 416.920; see also Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987) (describing the five-step process); Fastner v. Barnhart, 324 F.3d 981, 983-84 (8th Cir. 2003). If the Commissioner finds that a claimant is disabled or not disabled at any step, a decision is made and the next step is not reached. 20 C.F.R. § 404.1520(a)(4).

Here, the Commissioner determined that plaintiff maintained the residual functional capacity (RFC) to perform light work, and could therefore perform his past relevant work. Therefore, plaintiff failed to prove that he was disabled under the Act. Eichelberger v. Barnhart, 390 F.3d 584, 591 (8th Cir. 2004).

3. Decision of the ALJ

In the decision denying benefits, the ALJ found that plaintiff suffered from a severe impairment: lumbar degenerative disc disease. She found that it was severe because the condition had more than a minimal effect on plaintiff's ability to perform work-related activities. This impairment involved abnormal conditions at various levels of plaintiff's back: L2-3, L3-4, L4-5, and L5-S1. (Tr. 13.)

The ALJ also determined that plaintiff's impairment did not equal any impairment on the Commissioner's list of disabling impairments. (Id.) Ultimately, the ALJ found that plaintiff had the RFC to perform a wide range of light exertional work, including his past relevant work as the chief of operations at a county waste water facility³ and as a drafting and field surveyor,⁴ as he both performed the jobs and as they are usually performed in the national economy. (Tr. 16.)

The ALJ considered the medical evidence, including plaintiff's three back surgeries. The ALJ noted that plaintiff's last back surgery

³Alliance Water Resources, plaintiff's former employer, described plaintiff's previous job as requiring a Missouri driver's license, and a high school education. Basic understanding of electrical equipment, wells, and wastewater treatment was desired. Duties included taking water samples, meeting with people, making written reports, among other duties. (Tr. 15.) In this employment the record is undisputed that, in spite of his title, plaintiff supervised no one; he worked alone on his job site. (Tr. 50.) Plaintiff described this work as taking care of the facility's wells, tanks, and treatment plants; checking equipment; taking readings; cutting grass; answering all customer complaints; meeting with board members; and presenting monthly reports. He did paperwork daily, and occasionally carried a clip board and a tool pouch. The heaviest weight he lifted was 50 pounds and frequently lifted less than 10 pounds. (Tr. 156.)

⁴Plaintiff described the surveyor's job as requiring that he be out in the field collecting information, walking over land with a tripod and transit approximately one-half of each day, downloading electronic information into his office computer. He stated that this job required walking, standing, sitting, climbing, stooping, kneeling, crouching, and writing, each for one-hour each day. The heaviest weight he lifted was 20 pounds. (Tr. 157.)

was in 2000 and that he worked after that until 2004.⁵ The ALJ considered the November 2004 opinions of plaintiff's treating physician, Dr. Glen Calvin, that plaintiff's back pain interfered with his ability to support himself and his family and that he was disabled. (Tr. 183.) The ALJ found these opinions unpersuasive, because of plaintiff's work record, and Dr. Calvin's reliance on old tests (from 2000⁶). (Tr. 13-14.)

The ALJ found plaintiff's subjective complaints not totally credible. She noted that plaintiff reported only being able to sit for 30 minutes, but sat for much longer during the hearing with no noticeable discomfort. His medical treatment was infrequent, with large gaps, and many of his doctor visits were only for medication refills. He quit his job for non-medical reasons. The ALJ found that plaintiff "has not been honest with his physicians regarding his physical condition." The ALJ also found that plaintiff is able to drive, lift a gallon of milk, climb a flight of stairs, cook, and go shopping. (Tr. 15.)

4. Plaintiff's grounds for relief

Plaintiff argues that the decision of the ALJ is not supported by substantial evidence. More specifically, he argues that the ALJ (1) failed to properly weigh the medical evidence, and (2) failed to

⁵Plaintiff earned substantial income in 2000, 2002, 2003, and 2004. (Tr. 81.)

⁶On July 19, 2000, an MRI of plaintiff's back showed minimal spondylitic changes of the C3-6. The lumbar spine showed degenerative and spondylitic changes throughout the entire lumbar spine, evidence of past surgery, and recurrent disc herniation. (Tr. 173-75, 205-06.)

On July 31, 2000, plaintiff had a myelogram. It showed degenerative disc disease and spondylitic changes throughout the lumbar spine with disc space narrowing at L3-4, L4-5, and L5-S1. He had degenerative changes in the thoracic spine, and degenerative disc disease at the T3-4, milder at the T6-9. He had a cyst on his kidney. The cervical spine showed mild degenerative changes with disc protrusion. A CT examination showed degenerative disc disease. (Tr. 173-75, 179-81.)

identify the requirements of his past relevant work and compare it properly to his RFC. (Doc. 10.)

5. Discussion

a. Failure to weigh medical evidence

Plaintiff argues that the ALJ erred by not giving substantial weight to the opinion of his treating physician, Dr. Calvin.

The residual functional capacity is "the most [a claimant] can still do despite" his or her "physical or mental limitations." 20 C.F.R. § 404.1545(a). When determining plaintiff's RFC, the ALJ must consider "all relevant evidence" but ultimately, the determination of the plaintiff's RFC is a medical question. Lauer v. Apfel, 245 F.3d 700, 704 (8th Cir. 2001). As such, the determination of plaintiff's ability to function in the workplace must be based on some medical evidence. Id.; see also Nevland v. Apfel, 204 F.3d 853, 858 (8th Cir. 2000). " In evaluating a claimant's RFC, the ALJ is not limited to considering medical evidence, but is required to consider at least some supporting evidence from a professional. See 20 C.F.R. § 404.1545(c)" Baldwin v. Barnhart, 349 F.3d 549, 556 (8th Cir. 2003).

The ALJ found that plaintiff maintained the RFC to "perform a wide range of light exertional work. Light exertional work requires a maximum lifting of 20 pounds, a frequent lifting of 10 pounds, and standing/walking for 6 out of 8 hours." (Tr. 17.) ⁷

When determining the RFC, "[t]he opinions of the claimant's treating physicians are entitled to controlling weight if they are supported by and not inconsistent with the substantial medical evidence in the record." Stormo v. Barnhart, 377 F.3d 801, 805 (8th Cir. 2004).

⁷The Commissioner's regulations describe light work as requiring the lifting of no more than 20 pounds, frequently lifting and carrying objects weighing up to 10 pounds; a light job can require "a good deal of walking or standing, or . . . sitting most of the time with some pushing and pulling of arm or leg controls." See 20 C.F.R. § 404.1567(b).

"Such opinions are given less weight if they are inconsistent with the record as a whole or if the conclusions consist of vague, conclusory statements unsupported by medically acceptable data." Id.; Singh v. Apfel, 222 F.3d 448, 452 (8th Cir. 2000). "By contrast, '[t]he opinion of a consulting physician who examines a claimant once or not at all does not generally constitute substantial evidence.'" Singh, 222 F.3d at 452 (quoting Kelley v. Callahan, 133 F.3d 583, 589 (8th Cir. 1998)). The ALJ must set forth her reasons for the weight given to a treating physician's assessment. Singh, 222 F.3d at 452.

Here, the ALJ considered Dr. Calvin's November, 18, 2004 opinions that plaintiff was totally disabled and that his back pain interfered with his ability to provide for himself or his family. However, she said she was not giving it significant weight, because she felt the doctor was unaware of plaintiff's work history (plaintiff worked after the myelogram and MRI in 2000), because the myelogram and the MRI on which the doctor relied were old, because the 2005 MRI report was inconclusive, and because plaintiff did not followup with a neurosurgeon as suggested to him. (Tr. 14.)

Plaintiff argues that Dr. Calvin's notes do not indicate he knew or did not know anything about plaintiff's work history or lack of it, that even if Dr. Calvin relied on an old MRI, the 2005 MRI⁸ was not inconsistent with the 2000 tests, and that the 2005 MRI was not inconclusive as the ALJ stated.

The ALJ properly considered and discredited the opinions of Dr. Calvin. First, the final decision over whether a plaintiff is disabled under the Act involves both findings of fact and conclusions of law and is reserved for the Commissioner to make. Forehand v. Barnhart, 364 F.3d 984, 986 (8th Cir. 2004). Second, the doctor's opinions, rendered in 2004, were based on four-year-old test results. Third, Dr. Calvin stated that plaintiff was unable to work, when in fact he had been

⁸On March 15, 2005, an MRI of plaintiff's lumbar spine showed moderate central stenosis at L5-S1, moderate central stenosis at the L2 through L5 levels, mild degenerative changes at the L2-3 facet joints, and minimal disc bulging at the L3-4, with degenerative changes at the facet joints. (Tr. 163-64.)

working for four years after the 2000 tests. Finally, Dr. Calvin never stated that plaintiff should limit his activities.

Even if the 2005 MRI is consistent with the 2000 MRI and not "inconclusive" as the ALJ suggested,⁹ such is not fatal to the ALJ's decision. This MRI does not show that plaintiff has a disabling condition. And it was suggested that plaintiff see a neurosurgeon, which he did not do. (Tr. 163.)

The RFC found by the ALJ is supported by the written report of the consultative physical examination of plaintiff on August 11, 2004, by Raymond Leung, M.D. He considered plaintiff's statements of his conditions and pain. Plaintiff told the doctor that he could squat without difficulty, he can walk from one to five blocks, he can climb from one to five flights of stairs at a time, and he can lift as "much as his pain would allow him to lift." Dr. Leung stated that plaintiff did not use a walker or a cane, has no difficulty with grip strength, and is capable of buttoning, zipping, and dressing himself without difficulty. The doctor noted that plaintiff was in no apparent distress, although he developed mild to moderate pain. After examining plaintiff, including his musculoskeletal and extremity condition, he reported his impressions that plaintiff's forward flexion of the lumbar spine was limited to 50 degrees, with sideways flexion limited to 20 degrees. Plaintiff's gait was normal. He could walk 50 feet without assistance, could heel walk, could walk on his toes. He had no paralumbar spasms. He had no difficulty getting on and off the examination table. His arm and grip strength were normal. He had no muscle atrophy. Plaintiff had decreased leg strength, slightly more on the right. (Tr. 198-202.)

On August 26, 2004, Janie R. Vale, M.D., made a written assessment of plaintiff's physical residual functional capacity. From the record¹⁰

⁹There is nothing in the record to suggest this MRI is inconclusive. It merely describes the physical conditions observed by the reviewing physician. (Tr. 163-64.)

¹⁰Before rendering her report, Dr. Vale spoke by telephone with plaintiff (Tr. 134) and carefully reviewed the medical data in the record.

she determined that plaintiff could occasionally lift and carry 20 pounds, frequently carry 10 pounds, stand and walk for 6 hours in an 8-hour workday, and sit for 6 hours in an 8-hour workday; and that he had unlimited ability to push and pull. Dr. Vale specifically stated those portions of the record that supported these findings. (Tr. 126-27.) She further found that plaintiff could frequently balance himself, and occasionally climb stairs, stoop, kneel, crouch, and crawl. She stated that the limitations she placed on these activities would decrease the pain plaintiff would otherwise feel. (Tr. 127.) Dr. Vale found that plaintiff had no limitations regarding his ability to manipulate, to see, or to communicate. (Tr. 128-29.) She found that plaintiff had no limitations as to work environment, except that he should avoid exposure to vibration and hazards. (Tr. 129.) Her assessment of plaintiff's RFC was specific and not conclusory. (Tr. 126-32.)

The ALJ also made a proper determination of plaintiff's credibility when determining his RFC, in accordance with the factors stated in Polaski v. Heckler, 739 F.2d 1320, 1322 (8th Cir. 1984). "The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians" Polaski, 739 F.2d at 1322. Factors to be considered include plaintiff's daily activities; the duration, frequency, and intensity of any pain; any precipitating factors; whether plaintiff has been taking pain medication and the dose; and any functional restrictions. Id.; Depover v. Barnhart, 349 F.3d 563, 566 (8th Cir. 2003). The ALJ may not discredit plaintiff's subjective complaints based solely on personal observation. Polaski, 739 F.2d at 1322. "Subjective complaints may be discounted if there are inconsistencies in the record as a whole." Singh, 222 F.3d at 452. "An ALJ who rejects such complaints must make an express credibility determination explaining the reasons for discrediting the complaints." Singh, 222 F.3d at 452.

The ALJ considered the Polaski factors and there is substantial evidence supporting her decision that plaintiff's subjective complaints were not fully credible. Plaintiff worked for four years after his last

back surgery in 2000. Plaintiff did not appear uncomfortable during the hearing, and, while hearing demeanor cannot be a sole reason for a decision, it is a factor that can be considered. Ply v. Massanari, 251 F.3d 777, 779 (8th Cir. 2001). Plaintiff also left work right after he was notified of an overpayment of a previous social security claim of \$12,000. (Tr. 28, 39.) No treating doctor told him he needed to limit his activities. Curran-Kicksey v. Barnhart, 315 F.3d 964, 969 (8th Cir. 2003).

Plaintiff argues that his ability to do light housework should not preclude a finding of disability. However, the level of activity carried out by plaintiff is much more than light housework. See Easter v. Bowen, 867 F.2d 1128, 1130 (8th Cir. 1989). Plaintiff testified at the hearing that he is able to drive up to a half hour before feeling pain, can stand for 20 to 30 minutes before feeling pain, can walk a block, can climb a flight of stairs, can lift a gallon of milk, can raise his hands above his head, can sometimes crouch and squat, grocery shop once or twice a week, and is able to bathe, put on his clothes, does not read because he has no desire to do so, and watches TV. (Tr. 29-38.)

There were also large gaps in treatment, and plaintiff did not seek treatment by a neurosurgeon as recommended by Dr. Calvin. (Tr. 187.) The record does not show that plaintiff saw any physician from September 11, 2000 until August 30, 2002. Infrequent doctor visits can indicate that the plaintiff's complaints are not credible. See Buckler v. Bowen, 860 F.2d 308, 311 (8th Cir. 1988); Benskin v. Bowen, 830 F.2d 878, 884 (8th Cir. 1987). Further, "a failure to seek treatment may indicate the relative seriousness of a medical problem." Tate v. Apfel, 167 F.3d 1191, 1197 (8th Cir. 1999) (quoting Shannon v. Chater, 54 F.3d 484, 486 (8th Cir. 1995)). Plaintiff argues that he did not seek a follow up appointment suggested by his doctor due to financial hardship. However, "failure to pursue more aggressive treatment cannot be wholly excused due to his claims of financial hardship." Tate, 167 F.3d at 1197.

There is substantial evidence supporting the RFC attributed to plaintiff.

b. Past Relevant Work

"The ALJ evaluates a claimant's ability to do past relevant work based on a review of the claimant's residual functional capacity and the physical and mental demands of his past work." Evans v. Shalala, 21 F.3d 832, 833 (8th Cir. 1994). "The ALJ must specifically set forth the claimant's limitations, both physical and mental, and determine how those limitations affect the claimant's residual functional capacity." Pfitzner v. Apfel, 169 F.3d 566, 568 (8th Cir. 1999) (quoting Groeper v. Sullivan, 932 F.2d 1234, 1238-39 (8th Cir. 1991)). Further, the ALJ must then "make explicit findings regarding the actual physical and mental demands of the claimant's past work." Pfitzner, 169 F.3d at 569. The ALJ may refer to the Dictionary of Occupational Titles (DOT) to determine the description of plaintiff's past work. Id.

Here, the ALJ set forth plaintiff's limitations and made explicit findings regarding his past relevant work, based on the record and plaintiff's description of what he did. (Tr. 15-16.) The ALJ determined that plaintiff's past job with the water works is described by the Dictionary of Occupational Titles as light work, citing §§ 005.167-101, 954.382-010, and 184.167-246. The undersigned has reviewed these DOT sections and finds them not applicable to the facts of this case. Assuming the ALJ intended § 005.167-010 (there not being an - 101), that section and § 184.167-246 describe the positions of Chief Engineer and Supervisor of a waterworks as having many requirements and responsibilities not performed by plaintiff. Ultimately, the undersigned agrees with plaintiff that the closest description in the DOT of this past relevant work is found at § 954.382-014 (Water Treatment Plant Operator (waterworks)), which is described as heavy work. Section 954.382-010 is for a pump station waterworks operator, which is not what plaintiff did.

The ALJ also determined that as plaintiff performed the water works job, it involved light work. This is inaccurate. Clearly, the occasional requirement of lifting 50 pounds, see footnote 3 above, takes the position out of the light exertional category.

The ALJ also determined that plaintiff could perform his past work as a surveyor, which the ALJ found described as light work in the DOT

at § 018.167-018 (Land Surveyor). The undersigned agrees with plaintiff that what plaintiff did in this position, see footnote 4 above, is not described in § 018.167-018, because the cited position is clearly a supervisory position. Rather, §018.167-034 (Surveyor Assistant, Instruments) is more like what plaintiff performed, especially in that plaintiff actually went into the field with the tripod and transit. As plaintiff argues, while this is closer to what the record describes, the ALJ did not adequately explain how plaintiff's RFC would allow him to perform this work now, with the physical exertional requirements of the job as he performed it. The ALJ must "make explicit findings regarding the actual physical and mental demands of the claimant's past work." Pfitzner, 169 F.3d at 569. This was not done in this case.

This action should be remanded for further consideration of plaintiff's applications at the Step 4 level.

RECOMMENDATION

For the reasons set forth above, it is the recommendation of the undersigned that the decision of the Commissioner of Social Security be reversed and remanded to the Commissioner for further proceedings under Sentence 4 of 42 U.S.C. § 405(g).

The parties are advised that they have ten days to file written objections to this Report and Recommendation. The failure to file timely written objections may waive the right to appeal issues of fact.

 /S/ David D. Noce
DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE

Signed on July 19, 2007.